IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL., SPRINT MISSOURI, INC.,	)	
	)	**CASE NO. SC 86584**
APPELLANT,	)	
	)	
v.	)	
	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL.,	)	
	)	
RESPONDENTS,	)	
	)	
OFFICE OF PUBLIC COUNSEL,	)	
	)	
INTERVENOR.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
THE HONORABLE RICHARD G. CALLAHAN

APPELLANT'S SUBSTITUTE REPLY BRIEF

SPRINT MISSOURI, INC. d/b/a SPRINT

Brett D. Leopold - MO Bar #45289
6450 Sprint Pkwy
MS: KSOPHN0212-2A353
Overland Park, KS 66251
Voice: 913-315-9155 Fax: 913-523-9630
Email: brett.d.leopold@mail.sprint.com

Kenneth A. Schifman - MO Bar #42287
6450 Sprint Pkwy
MS: KSOPHN0212-2A303
Overland Park, KS 66251
Voice: 913-315-9783 Fax: 913-523-9827
Email: kenneth.schifman@mail.sprint.com

April 21, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

REPLY ARGUMENT.....3

AS THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, CONCLUDED, THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN REJECTING SPRINT'S TARIFF UNDER THE AUTHORITY OF SECTION 392.230.3 BECAUSE THE COMMISSION LACKS STATUTORY AUTHORITY TO REJECT A TARIFF FILED IN COMPLIANCE WITH THE PRICE CAP PROVISIONS OF SECTION 392.245 RSMo......3

CONCLUSION.....9

CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g).....12

TABLE OF AUTHORITIES

Cases

Inter-City Beverage Co. Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875 (Mo. App. W.D. 1994) 7

St. Louis County v. State Tax Commission, 529 S.W.2d 384, 396 (Mo. 1975). 8

State ex rel. Intern. Telecharge, Inc. v. Missouri Public Serv. Comm'n, 806 S.W.2d 680 (Mo. App. W.D. 1991) 7

State ex. rel. Sprint Missouri, Inc. v. Public Serv. Comm'n, WD 63580 (Mo. App. Dec. 7, 2004) 4, 7

State v. Felker, 336 S.W. 2d 419, 420 (Mo. App. S.D. 1960) 8

Statutes

Section 386.330 RSMo 5, 6

Section 392.245 RSMo 3, 6, 7, 8, 9

Section 392.470 RSMo. 5

REPLY ARGUMENT

AS THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, CONCLUDED, THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN REJECTING SPRINT'S TARIFF UNDER THE AUTHORITY OF SECTION 392.230.3 BECAUSE THE COMMISSION LACKS STATUTORY AUTHORITY TO REJECT A TARIFF FILED IN COMPLIANCE WITH THE PRICE CAP PROVISIONS OF SECTION 392.245 RSMo.

In the Office of Public Counsel's ("OPC") Substitute Brief to this Court, OPC argues that the Missouri price cap statute, Section 392.245 RSMo, does not limit the Missouri Public Service Commission's (the "Commission") authority over Sprint Missouri, Inc.'s statutory discretion to set rates and prices for nonbasic services, such as Sprint's optional Metropolitan Calling Area ("MCA") telecommunications service. As described more fully in Sprint's Initial Brief, the OPC's position is simply wrong as the Missouri price cap statute does mandate specific criteria and establish specific limits for the Commission's exercise of authority over rates charged by Sprint and other price cap companies.

The Missouri price cap statute explicitly limits the Commission's ability to reject any rate that is less than (or equal to) the established maximum price caps. As the court of appeals recognized in its well-reasoned decision below (attached to this substitute reply brief), Sprint is statutorily entitled to increase its maximum allowable prices for its nonbasic services by a maximum of 8% annually. State ex rel. Sprint

Missouri, Inc. v. Public Serv. Comm'n, WD 63580 (Mo. App. Dec. 7, 2004), p. 3. The court of appeals also noted the undisputed fact that the Commission-rejected rates for nonbasic services that Sprint proposed were, in all instances, less than (or equal to) the applicable maximum allowable prices, which had received prior approval from the Commission. Id., p. 5.

Despite the clear, mandatory language in the Missouri price cap statute that limits the Commission's ratemaking authority, OPC maintains that the language in the statute can be ignored because other provisions of the Missouri statutes provide general authority over all public utilities. OPC's arguments fail for two reasons. First, Sprint does not contend, as OPC asserts, that price cap regulation gives Sprint "the absolute right to [nonbasic service rate] increases without any review or oversight." (Substitute Brief of Intervenor OPC, p. 25.) Next, OPC's arguments refuse to acknowledge the clear statutory limitations the state legislature placed upon the Commission's authority over rate increases for nonbasic services that are below (or equal to) the maximum allowable prices for those services.

Sprint's legal challenge in the circuit court and court of appeals specifically addressed a Commission order denying a tariff increase to increase rates that were demonstrably below (or equal to) the maximum allowable price allowed by the Missouri price cap statute for Sprint's nonbasic MCA services. Contrary to OPC's overreaching mischaracterizations, Sprint seeks only to exercise the discretion to raise rates that was expressly granted by the Missouri legislature. Far from the "absolute right to increases

without any review or oversight" imagined by OPC, the Commission, for instance, clearly maintains authority to reject a rate increase for nonbasic services if such increases exceed the "maximum allowable prices" described in the price cap statute. After setting up the erroneous "straw man" assertion that Sprint is seeking unfettered rate increases, OPC cites a collection of Missouri statutory provisions for the proposition that Sprint is not free from all regulation of its rate increases. OPC characterizes Sections 392.470 and 386.330.1 RSMo. as statutory provisions granting expansive general authority over Sprint that would allegedly override the pricing flexibility granted Missouri price cap companies and the specific limitations placed on the Commission's authority that the legislature intended. OPC misreads these statutes. For instance, Section 392.470 RSMo., cited by OPC, reads in relevant part as follows:

> The commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest **and consistent with the provisions and purposes of this chapter**…(Emphasis added).

Clearly, nothing in Section 392.470 RSMo. overrides the limitations in the price cap statute. Just the opposite, the statute relied on by OPC expressly preserves the limitation that any conditions imposed by the Commission must be consistent with the other provisions of Chapter 392 including the Missouri price cap statute.

OPC's reliance on Section 386.330.1 RSMo. is also misplaced. Section 386.330.1 RSMo. states in relevant part:

> The commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, and the commission shall **make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation in violation of any provision of law** or in violation of any order or decision of the commission. (Emphasis Added)

Again, nothing in Section 386.330.1 overrides the specific provisions of the price cap statute. Any exercise of supervision by the Commission under this provision must be consistent with Section 392.245. OPC's attempts to broaden the Commission's jurisdiction over price cap companies should be rejected.

OPC's arguments also ignore generally acknowledged statutory limitations on the regulatory authority of the Commission. As noted in both Sprint's Initial Brief and the court of appeals decision below, the Commission is an agency of limited jurisdiction and has only such powers as are conferred upon it by statute. State ex rel. Sprint Missouri, Inc., p. 10; Inter-City Beverage Co. Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875 (Mo. App. W.D. 1994). The Commission's authority is limited to that specifically granted by statute or warranted by clear implication as necessary to

effectively render the specifically granted power, and it cannot adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature. State ex rel. Sprint Missouri, Inc., p. 11; State ex rel. Intern. Telecharge, Inc. v. Missouri Public Serv. Comm'n, 806 S.W.2d 680 (Mo. App. W.D. 1991). The court of appeals recognized in its careful analysis and application of Section 392.245 that OPC's arguments would require a strained reading of that statute, which would ultimately grant the Commission broad authority over rate increases for nonbasic service that was not intended by the Missouri legislature. The court of appeals effectively evaluates and rejects OPC's implausible reading of the price cap statute. State ex rel. Sprint Missouri, Inc., p. 12-18. For instance, the court of appeals recognized and described the critical distinction between the maximum allowable prices that are authorized by the Missouri statute and the rate increases that Sprint may choose to tariff at different times depending upon its business judgment and market conditions. Id., p. 12. The court of appeals also found that in arguing to take away the pricing flexibility that the legislature granted price cap companies for nonbasic services, OPC and the Commission's erroneous interpretation of Missouri law would simply drive price cap companies to make annual rate increases equal to the maximum allowable prices in each and every year instead of allowing companies to use the statutory discretion intended by the legislature to "bank" potential future rate increases -- future rate increases that can never exceed the maximum allowable prices set by statute in any circumstance. Id., p. 15-18. Thus, properly read and applied, the legislature provided flexibility to price cap companies, such as Sprint,

while maintaining express limits on the scope of that flexibility that protect consumers1

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1 In its substitute brief at pages 18-19, OPC injects a new argument regarding the "mandatory" or "directory" interpretation of the word "shall" in statutory construction. Sprint could not find this argument, nor the St. Louis County v. State Tax Commission, 529 S.W.2d 384, 396 (Mo. 1975) and State v. Felker, 336 S.W. 2d 419, 420 (Mo. App. S.D. 1960) cases cited by OPC, in the briefs submitted to the court of appeals. Accordingly, Sprint contends this argument should not be considered pursuant to Missouri Rule 83.08(b) that disallows the alteration of any claim raised in the court of appeals. In its Initial Brief to the court of appeals and also to this Court, Sprint argued at page 26 that the word "shall" appearing throughout the price cap statute should be read to carry its plain meaning and given a mandatory interpretation. Thus, as Sprint argued, the Commission is required by Section 392.245.5 to approve Sprint's tariffs to change its rates as long as the rate increases do not exceed the maximum allowable prices. OPC should not be allowed to inject the doctrine regarding "mandatory" and "directory" interpretations that it did not raise at the court of appeals. Even if this Court chooses to evaluate OPC's new argument, it should be rejected on the merits. To read "shall" as "directory," rather than "mandatory," in the context of the Missouri price cap statute makes the statute incoherent. For instance if "shall" does not require any "mandatory" action for the approval of tariffs in section 392.245.5, it is equally plausible that "shall" is not "mandatory" in section 392.245.3; and if "shall" is not

CONCLUSION

For the reasons stated in Sprint's Initial Brief and in this Substitute Reply Brief, Sprint requests that this Court rule, as the court of appeals ruled, that the Commission's order rejecting Sprint's tariff for allegedly failing to comply with the Missouri price cap statute is inconsistent with the Missouri price cap statute and, therefore, unlawful.

"mandatory" in section 392.245.3, this Court could presumably conclude that the "maximum allowable prices" established for a company need not be those in effect on December 31st of the preceding year. Sprint does not advocate that position, but only raises it here to illustrate the implausibility of OPC's argument that "shall" should not carry its plain, mandatory meaning in the price cap statute. The legislature deftly alternates its use of "shall" and "may" throughout Section 392.245 manifesting a very deliberate intention to draw a distinction between permissive, directory and mandatory language.

Respectfully submitted,

SPRINT MISSOURI, INC.

Brett D. Leopold - MO Bar #45289
6450 Sprint Parkway
MS: KSOPHN0212-2A353
Overland Park, KS 66251
Voice: 913-315-9155
Fax: 913-523-9630
Email: brett.d.leopold@mail.sprint.com

and

Kenneth A. Schifman - MO Bar # 42287
6450 Sprint Parkway
Overland Park, KS 66251
Voice: 913-315-9783
Fax: 913-523-9827
Email: kenneth.schifman@mail.sprint.com

By:
_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of April, 2005, the above and foregoing Reply Brief of Appellant Sprint Missouri, Inc. was served by placing a copy of the same in the U. S. Mail, postage prepaid to each of the following:

David A. Meyer
Associate General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102-2230

_____

Brett D. Leopold

CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Appellant Reply Brief of Sprint Missouri, Inc. complies with the limitations contained in Rule 84.06(b) and, according to word count of the word processing system used to prepare the Brief (excepting there from the cover, certificate of service, this certificate, and the signature block and appendix) contains 1,874 words. I hereby certify that the disk containing this Brief and submitted to the Court has been scanned for viruses and that the scan indicated that the disk was virus free.

_____

Brett D. Leopold - MO Bar #45289
6450 Sprint Parkway
MS: KSOPHN0212-2A353
Overland Park, KS 66251
Voice: 913-315-9155
Fax: 913-523-9630
Email: brett.d.leopold@mail.sprint.com

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Brett D. Leopold - MO Bar #45289
6450 Sprint Pkwy
MS: KSOPHN0212-2A353
Overland Park, KS 66251
Voice: 913-315-9155 Fax: 913-523-9630
Email: brett.d.leopold@mail.sprint.com

Kenneth A. Schifman - MO Bar #42287
6450 Sprint Pkwy
MS: KSOPHN0212-2A303
Overland Park, KS 66251
Voice: 913-315-9783 Fax: 913-523-9827
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April 21 2005

TABLE OF CONTENTS
APPENDIX TO APPELLANT'S SUBSTITUTE REPLY BRIEF

State ex. rel. Sprint Missouri, Inc. v. Public Serv. Comm'n, WD 63580 (Mo. App. Dec. 7, 2004) A1